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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re CARMEN C., a Person Coming  
Under the Juvenile Court Law.

B169877

(Los Angeles County  
Super. Ct. No. CK43497)

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES,

Plaintiff and Respondent,

v.

EVELYN E.,

Defendant and Appellant.

APPEAL from two orders of the Superior Court of Los Angeles County,  
Margaret S. Henry, Judge. Affirmed.

Donna B. Kaiser, under appointment by the Court of Appeal, for Defendant  
and Appellant.

Lloyd W. Pellman, County Counsel, James Owens, Deputy County Counsel,  
and Catherine Godfrey, for Plaintiff and Respondent.

## **INTRODUCTION**

Evelyn E. (Evelyn), the mother of Carmen C., a dependent child of the juvenile court, appeals from the denial of a Welfare and Institutions Code section 388<sup>1</sup> petition to reinstate the reunification process and from an order terminating her parental rights under section 366.26. We affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

Carmen was born in October 2001 to Evelyn and Marcelino C., (Marcelino).<sup>2</sup> Carmen was placed in foster care in December 2001. One month later, she was placed in the home of her paternal grandparents who have cared for her since. In April 2002, Carmen was declared a dependent child pursuant to section 300 subdivisions (b) and (j), based on sustained allegations that both parents had substance abuse problems, Marcelino physically abused Evelyn and injured Carmen during an altercation with Evelyn, who had limited ability to protect Carmen, and Evelyn previously failed to reunify with Maxine P., a daughter from a prior relationship.

Maxine was the subject of prior dependency proceedings arising from Evelyn's drug abuse. She was removed from Evelyn's care in September 2000, and was placed in the custody of her natural father in November 2001. Evelyn was ordered to enroll in a drug rehabilitation program with random drug testing, individual counseling to address domestic violence, and parent education classes.

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<sup>1</sup> All further statutory citations are to the Welfare and Institutions Code.

<sup>2</sup> Marcelino is not a party to this appeal and does not oppose adoption.

According to the adoption assessment dated June 11, 2002, Carmen was functioning well under the care of her grandparents and was attached to them. The assessment stated that Carmen's sibling (without mentioning whether it was a paternal or maternal sibling) was not a dependent of the court and that she had no relationships with siblings at that time. The separate sibling assessment portion of the report listed three paternal siblings, but Maxine P., Carmen's maternal half sibling, was not mentioned.

Evelyn entered a residential drug rehabilitation program in July 2002, but dropped out six months later without completing the last two steps of getting a job and transitioning into sober living. Instead, she moved back into her government housing unit, obtained a job and purportedly maintained her sobriety on her own.

An August 2002 report issued by the Department of Children and Family Services (the Department) stated Carmen did not seem comfortable with Evelyn when she held her. Evelyn was very affectionate with Carmen. Evelyn waited until July 2002 before enrolling in a drug rehabilitation program. She blamed her delay in enrollment on Marcelino who battered her for six weeks and would not let her leave the house or use the telephone. She obtained a restraining order against him in May 2002. The Department recommended terminating reunification services.

According to the September 2002 addendum report, Evelyn visited regularly in 2002 except when she had scheduling conflicts with her rehabilitation program. Carmen became more comfortable with Evelyn and would visit alone with her for at least 15 minutes without crying and looking for her grandparents. The Department recommended terminating reunification proceedings and scheduling a section 366.26 hearing.

During a September 2002 status review hearing, the juvenile court found that Evelyn had only partially complied with her case plan and there was no substantial probability that Carmen would be returned within the next six months. The court terminated reunification services and ordered permanent placement services.

In March 2003 Evelyn filed a section 388 petition seeking an order to reopen reunification proceedings and to place Carmen in her custody. Evelyn attached letters from the drug rehabilitation program stating she was ready for the last two stages of rehabilitation. She submitted a letter from the housing authority stating she needed to live in her unit. Evelyn also submitted a parental education course completion certificate and drug test results.

During the section 388 hearing on April 23, 2003, Evelyn withdrew her petition in order to investigate what later proved to be a false positive drug test report. Evelyn filed a second section 388 petition in June 2003, attaching an anger management class completion certificate, and documentation of her attendance at Narcotics Anonymous meetings, as well as copies of the previously submitted exhibits.

The April 2003 selection and implementation report stated visitation had been consistent since July 2002. Carmen would not visit with Evelyn without a grandparent in the room until most recently when Carmen would stay alone with Evelyn for 10 to 15 minutes. While Carmen appeared happy to interact with Evelyn as long as Evelyn entertained her, some of the visits ended early when Carmen no longer wanted to interact with Evelyn. Carmen had no apparent bond with Evelyn. In contrast, Carmen was reported to be strongly and securely bonded with her grandparents, who appeared to be very capable parents. Carmen

interacted with them as if they were her parents. She occasionally visited with her paternal siblings on weekends and during family gatherings. The Department recommended terminating the monitored visits and continuing the case for a section 366.26 hearing with adoption as the permanent plan.

An addendum report issued in April 2003 stated that continued drug rehabilitation was essential given Evelyn's long history of drug use. According to the rehabilitation treatment plan, Evelyn used cocaine for six years and methamphetamine for 18 months; she also had a history of relapsing. Evelyn had not provided drug test results for three months. She appeared to have limited parenting skills. The Department recommended denial of the section 388 petition.

A July 2003 addendum report indicated Carmen had trouble bonding with Evelyn for six months and constantly sought out her grandparents as a security system when interacting with Evelyn. During the last two months Carmen was more willing to interact with Evelyn. She was at a crucial point in forming a bond with Evelyn, but a fully developed bond had not been established. Evelyn told the social worker that her attempts to enroll in low cost individual domestic violence counseling were thwarted by her income. She felt empowered by her job and refused to give it up for counseling.

In August 2003 the juvenile court held a combined section 388 and section 366.26 hearing. Evelyn admitted using rock cocaine while she was pregnant with Carmen, but claimed that she only voluntarily used drugs before she realized she was pregnant. Later on during the pregnancy Marcelino forced her to use cocaine. She did not understand how Marcelino's drug use could impact Carmen.

Evelyn testified that Marcelino held her hostage and prevented her from enrolling in drug rehabilitation until July 2002, but she later contradicted this

statement. Evelyn stated she dropped out of the drug rehabilitation program to avoid losing her government subsidized housing unit. The monthly rent for the housing unit was \$60. She would have had to pay a monthly rent of \$350 to \$450 if she had stayed in rehabilitation and had gone into a sober living program. According to Evelyn, her social worker said she did not see why there would be a problem with dropping out of the rehabilitation program under the circumstances. The social worker testified she told Evelyn that the letter from the housing authority would perhaps suffice.

The social worker also testified the weekly visits had been consistent since Evelyn dropped out of drug rehabilitation. The quality of the visits had improved since January 2003. Evelyn needed help with comforting and interacting with Carmen but was becoming more maternal in nature. Carmen was slowly getting more comfortable with Evelyn. Most of the time the grandparents would stay for the first 15 minutes of a visit in order to give Carmen a chance to adjust, but during one July visit this was unnecessary. Carmen called Evelyn “mom” or “mommy.”

The social worker testified Evelyn failed to comply with the random drug testing and domestic violence aspects of the case plan. Evelyn testified after she left the rehabilitation program she underwent nonrandom drug testing at an unapproved laboratory where the submissions of urine samples were not monitored. The Department objected to the drug test reports on the grounds of hearsay and lack of authenticity and because they were not done by a Department-approved facility.

A drug rehabilitation program counselor testified that the program had no specific domestic violence content. He “probably” discussed domestic violence with Evelyn on occasion during individual counseling sessions, but it was not a

primary focus. Another counselor testified that Evelyn participated in an anger management group where domestic violence was discussed, but this did not constitute completion of the court-ordered requirement of domestic violence counseling. Evelyn testified she was rejected by two programs offering individual domestic violence counseling because she was not on general relief. The counseling would otherwise cost \$750 per month.

Evelyn testified that she visited Maxine bimonthly. The record contains no evidence of any relationship between Carmen and Maxine. Evelyn denied losing custody of Maxine because of her drug abuse.

The court denied the section 388 petition, concluding there was no material change in circumstances and Carmen's best interests would not be promoted by changing the prior order. The court acknowledged Evelyn had made some efforts and had progressed by at least attempting to get into and attend programs, but clearly had not learned anything and had made no progress on domestic violence issues. The court found that Evelyn's testimony relating to drugs was not credible, "[a]nd the drug testing was completely worthless." The court also concluded that Evelyn should not have dropped out of the drug rehabilitation program nor gone "back to a place that may very well be a trigger for drug use." The court stated "it's very clear from her testimony that, you know, whatever efforts she may have made in going to that program or going to N.A. [Narcotics Anonymous], she is not learning. She doesn't understand how to take responsibility." It denied Evelyn's petition "for all the reasons stated by counsel."

At the section 366.26 hearing, the court found by clear and convincing evidence Carmen was adoptable and the subdivision (c)(1)(A) exception to adoption was not proven. It then terminated Evelyn's parental rights.

This appeal followed.

## **DISCUSSION**

Evelyn contends the juvenile court erred in denying her section 388 petition and thus refusing to reopen reunification services and return Carmen to Evelyn's custody. She also contends the court erred in terminating her parental rights because this case fell within the exceptions found in section 366.26, subdivision (c)(1)(A) or section 366.26 subdivision (c)(1)(E).

### *A. Section 388*

Section 388 provides for the modification of a prior order upon a demonstration of changed circumstances or new evidence where the proposed modification is in the child's best interests. (§ 388, subds. (a) and (c).) Factors to consider when determining a child's best interests include: (1) the seriousness of the underlying problem leading to the dependency; (2) the relative strength of the bond between the child and parent versus the bond between the child and caretaker; and (3) the degree to which the problem could be and was ameliorated. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 530-532.) The standard of review for section 388 determinations is the deferential abuse of discretion test. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.)

Evelyn contends the changed circumstances here include: (1) the social worker's approval of her early departure from the drug rehabilitation program due to her desire to keep her government housing unit; (2) Evelyn's accomplishment of the remaining steps of the rehabilitation program on her own; and (3) her participation in *some* domestic violence counseling.



In her reply brief, Evelyn contends the Department is estopped from claiming she did not complete her drug rehabilitation program because her social worker led her to believe that if she submitted a letter about her housing problem, she would not be required to complete the program.<sup>3</sup> But even assuming *arguendo* that estoppel does apply, Evelyn still failed to demonstrate sufficiently changed circumstances to warrant modifying the previous order.

Evelyn failed to comply with the random drug testing requirement by failing to demonstrate that she had stayed sober since she left the rehabilitation program in January 2003. Her subsequent drug test results were by an unaccredited laboratory where patients were not monitored to guard against fraud. The testing was not done randomly. This is sufficient to understand why the juvenile court concluded those drug test reports were of no evidentiary value.

Evelyn also failed to obtain individual domestic violence counseling as required. Her choice not to attend counseling which specifically focused on domestic violence demonstrates that she does not fully understand and recognize its importance in her rehabilitation process.

While Evelyn's desire for the companionship of her child Carmen is compelling, more compelling are Carmen's rights to a stable and loving family. (See *In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 609-610.) The juvenile court concluded that removing Carmen from the stable home environment provided by her grandparents and placing her with Evelyn would not be in Carmen's best interests. The evidence supports the juvenile court's determination. No abuse of discretion is demonstrated.

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<sup>3</sup> We granted the Department's request for permission to file a letter brief in response to this argument.

*B. Section 366.26, Subdivision (c)(1)(A)*

Under section 366.26, subdivision (c)(1), when the juvenile court finds by clear and convincing evidence that a child may not be returned to his or her parent and the child is likely to be adopted, the juvenile court must terminate parental rights *unless* it finds that an enumerated exception applies. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 826.) It is the parent's burden to show that these exceptional circumstances apply. (*Ibid.*)

Evelyn contends she falls within the scope of subdivision (c)(1)(A), which bars termination of parental rights when “[t]he parents . . . have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” We recognize the division of opinion regarding the standard of review applicable to a determination under subdivision (c)(1)(A). While most courts including our own court have reviewed this determination for the existence of substantial evidence (e.g., *In re Derek W.*, *supra*, 73 Cal.App.4th at p. 827; *In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1537; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575), at least one court has concluded that it is properly reviewed for abuse of discretion. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.)

It is unnecessary for us to resolve this division of opinion. In adopting the abuse of discretion standard, the court in *Jasmine D.* acknowledged that “[t]he practical differences between the two standards of review are not significant. ‘Evaluating the factual basis for an exercise of discretion is similar to analyzing the sufficiency of the evidence for the ruling. . . . Broad deference must be shown to the trial judge. The reviewing court should interfere only “if [it] finds that under all the evidence, viewed most favorably in support of the trial court’s action, no

judge could reasonably have made the order that he did.”””” (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351, quoting *In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067.)

Subdivision (c)(1)(A) establishes a two-prong test involving assessments of (1) the parent’s contact and visitation, and (2) the benefit to the child of continuing the existing relationship. As the court explained in *In re Autumn H.*, *supra*, 27 Cal.App.4th at page 575, the second prong concerns whether “the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.” In making this determination, the juvenile court “balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer,” or alternatively, the juvenile court assesses whether “severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed.” (*Ibid.*)

As the court in *Autumn H.* explained, the second prong requires a significant relationship that rises above incidental affection and care. It stated: “Interaction between natural parent and child will always confer some incidental benefit to the child. The significant attachment from child to parent results from the adult’s attention to the child’s needs for physical care, nourishment, comfort, affection and stimulation. [Citation.] The relationship arises from day-to-day interaction, companionship and shared experiences. [Citation.] The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent.” (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

Following *Autumn H.*, appellate courts have concluded that even frequent and loving contact between a child and a parent is not sufficient, by itself, to establish the significant parent-child relationship required under subdivision (c)(1)(A). (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418-1419.) As the court explained in *In re Jasmine D.*, *supra*, 78 Cal.App.4th at page 1350, “a *parental* relationship is necessary for the exception to apply, not merely a friendly or familiar one” because “[i]t would make no sense to forgo adoption in order to preserve parental rights in the absence of a real parental relationship.”

Nonetheless, the requisite relationship does not presuppose daily interaction. In *In re Casey D.* (1999) 70 Cal.App.4th 38, 51, the court clarified that the *Autumn H.* standard demands only “a relationship *characteristically* arising from day-to-day interaction, companionship and shared experiences.” (Italics added.) Thus, “[d]ay-to-day contact is not necessarily required, although it is typical in a parent-child relationship. A strong and beneficial parent-child relationship might exist such that termination of parental rights would be detrimental to the child, particularly in the case of an older child, despite a lack of day-to-day contact and interaction.” (*Ibid.*)

Thus, in assessing the existence of the requisite relationship, the juvenile court should balance the relevant considerations “on a case-by-case basis and take into account many variables, including the age of the child, the portion of the child’s life spent in the parent’s custody, the ‘positive’ or ‘negative’ effect of interaction between parent and child, and the child’s particular needs. [Citation.]” (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 811.)

Here, the juvenile court determined the requirements of subdivision (c)(1)(A) had not been met. Apparently the court reasoned that, even assuming

that there had been adequate contact and Evelyn had assumed a parental role, any detriment from terminating the existing relationship did not outweigh the benefits of adoption. The court concluded termination of Evelyn's parental rights would not be detrimental to Carmen.

The record supports the juvenile court's determination that Carmen's need for stability outweighed the benefits of an ongoing relationship with Evelyn. The evidence raises the reasonable inference that Carmen had no apparent significant positive emotional attachment with Evelyn. Despite 18 months of regular weekly visits, only once did Carmen stay alone with Evelyn for an entire one hour visit. In contrast, there is ample evidence that adoption by the grandparents offered Carmen a stable, loving home.

Evelyn disagrees, citing *In re Brandon C.*, *supra*, 71 Cal.App.4th 1530, and *In re Jerome D.*, *supra*, 84 Cal.App.4th 1200. Both of those cases are factually distinguishable. In *Brandon C.*, the juvenile court removed twin boys from the custody of their mother, who contended at the section 366.26 hearing that she fell within the subdivision (c)(1)(A) exception. During the section 366.26 hearing, the children's grandmother testified that the twins looked forward to their mother's visits and seemed to love her. The mother testified that she felt a close bond with the boys. She visited them when she was in the area. Relying on *In re Autumn H.*, our court in *Brandon C.* affirmed the juvenile court's findings, and stated, "[t]he trial court obviously credited the testimony" of the mother and grandmother regarding the "close bond between [the] mother and the boys, and that a continuation of contact would be beneficial." (*In re Brandon C.*, *supra*, 71 Cal.App.4th at p. 1537.) Here there is no similar credible evidence. Evelyn's bond with Carmen is tenuous at best. Given the deference owed to the judgment of the

trial court in such cases, it is significant that in *Brandon C.* we *affirmed* a trial court decision that found the (c)(1)(A) exception to be applicable. In this case, Evelyn seeks reversal of a trial court ruling that it is not.

In *In re Jerome D.*, *supra*, 84 Cal.App.4th at page 1203, a child was removed from the custody of his mother who had intentionally burned him. The Court of Appeal reversed the juvenile court's finding because the evidence was insufficient to support the findings of adoptability and of no benefit from a continuing relationship with the mother. (*Id.* at p. 1209.) The child had a close relationship with his mother, who was the only mother figure in his life. (*Id.* at p. 1207.) In contrast to the child in *Jerome D.*, who had lived with his mother for over six years, Carmen had only lived with Evelyn for six weeks.

In sum, the evidence supports the conclusion of the juvenile court that subdivision (c)(1)(A) is inapplicable.

### *C. Section 366.26, Subdivision (c)(1)(E)*

Under this exception, the juvenile court may bar termination of parental rights when “[t]here would be substantial interference with a child’s sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child’s best interest, including the child’s long-term emotional interest, as compared to the benefit of legal permanence through adoption.” (§ 366.26, subd. (c)(1)(E).) “To show a substantial interference with a sibling relationship the parent must show the existence of a significant sibling relationship, the severance

of which would be detrimental to the child. [Fn. omitted.] Many siblings have a relationship with each other, but would not suffer detriment if that relationship ended. If the relationship is not sufficiently significant to cause detriment on termination, there is no substantial interference with that relationship.” (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 951-952.)

After the Department determines a child is adoptable, the burden shifts to the parent to prove the sibling relationship exception. (*In re Erik P.* (2002) 104 Cal.App.4th 395, 401.) Contrary to Evelyn’s assertion, the court has no sua sponte duty to demonstrate that a statutory exception applies. (See *In re Rachel M.* (2003) 113 Cal.App.4th 1289, 1295.)

In our view, Evelyn has waived her contention that subdivision (c)(1)(E) applies by failing to present it to the juvenile court. As the court explained in *In re Erik P.*, *supra*, 104 Cal.App.4th 395, 403, if a parent does not raise the exception at the section 366.26 hearing, “not only does this deprive the juvenile court of the ability to evaluate the critical facts and make the necessary findings, but it also deprives this court of a sufficient factual record from which to conclude whether the trial court’s determination is supported by substantial evidence.” Moreover, Evelyn failed to point out the alleged inadequacies within the assessment report below. She therefore waived the contention that the report is deficient. (See *In re Urayna L.* (1999) 75 Cal.App.4th 883, 886; *In re Aaron B.* (1996) 46 Cal.App.4th 843.)

Even if Evelyn had raised the subdivision (c)(1)(E) exception, it would have been inapplicable. As explained above, Evelyn bore the burden of asserting and demonstrating that the exception applies. Evelyn failed to meet her burden. She also failed to articulate any specific facts in her appellate briefs to demonstrate

Carmen's sibling relationships are so beneficial that she should not be adopted by her paternal grandparents. The record is unclear regarding whether Carmen and Maxine had ever met, much less had any positive bond. In contrast, the record contains ample evidence of Carmen's stable, loving relationship with her grandparents. Thus, subdivision (c)(1)(E) is inapplicable.

### **DISPOSITION**

The orders are affirmed.

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CURRY, J.

We concur:

EPSTEIN, Acting P.J.

HASTINGS, J.